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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-666

VESCO & CO., INC.,

Petitioner,

vs.

INTERNATIONAL CONTROLS CORP.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

Respondent, International Controls Corp. ("ICC"), respectfully prays that the petition for the issuance of a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit, entered in this case on June 3, 1977, be denied. That order merely held that the District Court had not abused its discretion in denying petitioner's motion under Rule 60(b) of the Federal Rules of Civil Procedure.

This is the third time this matter is before the Court. In 1973 petitioner sought review of a January 15, 1974 order of the United States Court of Appeals for the Second Circuit (No. 73-1542). That order had affirmed the District Court's granting of a preliminary injunction and refusal to dismiss the complaint.

In 1976 petitioner sought a common law writ of certiorari to review a September 14, 1976 order of the Court of Appeals for the Second Circuit (No. 76-803). The petition filed at that time raised many of the issues presented on the present petition.

On both occasions referred to above this Court declined to issue the writ sought.

Statement of the Case

Background

On June 7, 1973 ICC commenced an action in the United States District Court for the Southern District of New York ("ICC Action") against a total of thirty-two defendants (including Robert L. Vesco ["Vesco"] and Vesco & Co. Twenty-two of said defendants had also been named as defendants in an action commenced in the same court by the Securities and Exchange Commission on November 27, 1972. The United States Court of Appeals for the Second Circuit in a decision on a prior appeal (*International Controls Corp.* v. *Vesco,* 490 F.2d 1334 [2d Cir. 1974], cert. den. 417 US 932 [1974]), noted that the complaint in the SEC action alleged:

> "a scheme of extraordinary magnitude, deviousness, and ingenuity in violation primarily of the anti-fraud provisions of the Securities and Exchange Act of 1934 . . . [and] charged that Robert Vesco masterminded and, with his cohorts, implemented a plan involving the manipulation of the assets and securities of a number of corporations controlled by Vesco including ICC", 490 F.2d at 1338-39.

The complaint in the ICC Action contained eleven counts and alleged violations of the Securities Exchange Act of 1934, principally Section 10(b) and Rule 10b-5, and charged Vesco with fraud, self-dealing, waste of corporate assets and breach of fiduciary duty.

At the time it instituted the action, ICC also moved for a preliminary injunction enjoining Vesco & Co. from transferring certain assets, including 846,380 shares of ICC stock it held of record. The District Court's order granting such relief was affirmed by the Court of Appeals in the decision referred to above and, as indicated, Vesco & Co.'s petition to this Court for a writ of certiorari was denied.

The Default Judgment Against Vesco

On October 5, 1973 a default judgment was entered against Vesco who, after being served on July 30, 1973, failed to appear to answer the complaint.*

In accordance with the October 5, 1973 judgment, a partial inquest was held which resulted in the entry on July 12, 1974 of a judgment against Vesco for $2,422,466.72. Although notice of said inquest was sent to Vesco he did not appear in connection therewith. Instead, Vesco & Co. appeared and argued for the first time that it should be given the right to defend the action on Vesco's behalf on the merits. This contention was rejected by Judge Stewart and the inquest proceeded, Vesco & Co. participating throughout.

In its petition (pp. 38-39), Vesco & Co. erroneously implies that Judge Stewart reneged on a promise to give Vesco & Co. a full hearing on the merits of ICC's claim against Vesco. This is not so. The only assurances given by Judge Stewart was that Vesco & Co. would be given a full hearing on the question of whether it was the alter ego of Vesco, thus permitting ICC to proceed against the assets of Vesco & Co., i.e. the 846,380 shares of ICC stock transferred to it by Vesco, in order to satisfy its judgment against Vesco. ICC had, from the inception, taken the

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* Vesco is presently residing in Costa Rica and has successfully resisted extradition attempts based upon outstanding indictments against him.

position that it would seek to enforce any judgment against Vesco in this manner.

The Alter Ego Hearing

In response to ICC's motion for an order permitting it to so reach the assets of Vesco & Co., Judge Stewart promptly set down for a full hearing the issue of whether Vesco & Co. was merely an alter ego of Vesco. After holding such a hearing, again with Vesco & Co. participating throughout, Judge Stewart entered a decision and order on August 22, 1975 in which he upheld ICC's contentions and directed Vesco & Co. to deliver its ICC stock to a court appointed receiver. Vesco & Co. has, to date, failed to do this.

Vesco & Co.'s Appeal from the Alter Ego Determination

On May 13, 1976 the United States Court of Appeals for the Second Circuit rendered a decision on Vesco & Co.'s appeal from Judge Stewart's August 22, 1975 decision. (*International Controls Corp.* v. *Vesco,* 535 F.2d 742 (2d Cir. 1976)). In effect the court found that the default judgment entered on July 12, 1974 lacked the certification of finality required by Rule 54(b) of the Federal Rules of Civil Procedure and remanded the case to the district court with the instruction that the district court could enter a final judgment, with the appropriate Rule 54(b) certification, as to those claims for which further damages could not be proven but could not enter a final judgment as to those claims for which further damages could be proven (535 F.2d at p. 749).

The Entry of the May 26, 1976 Amended Judgment

Immediately following the Court of Appeals' May 13, 1976 decision ICC moved before the district court for the entry of an amended judgment, *nunc pro tunc,* containing

the Rule 54(b) certification. After hearing Vesco & Co. in opposition to that application, Judge Stewart signed and entered the amended judgment (16a-17a*).

Vesco & Co.'s Attempt to Appeal from the May 26, 1976 Amended Judgment

Following the entry of the May 26, 1976 amended judgment, in response to letters addressed to the Court of Appeals by the attorneys for both Vesco & Co. and ICC, the Clerk of the Court of Appeals advised the parties that the prior appeal "is no longer before this court". This was on June 23, 1976, five days prior to the time that Vesco & Co. was required to file a Notice of Appeal from the May 26, 1976 amended judgment.

Although it was advised, in effect, that it would have to initiate a new appeal, Vesco & Co. waited until July 7, 1976 before filing its Notice of Appeal. Since no order extending the time for filing an appeal had been entered, the Court of Appeals did not have jurisdiction over the appeal and, in response to ICC's motion, entered an order of dismissal on September 14, 1976. At the same time the court also denied Vesco & Co.'s motion for reconsideration of the issues raised on the prior appeal, obviously deciding not to enlarge the 14 day requirement contained in Rule 40 of the Federal Rules of Appellate Procedure. Vesco & Co.'s motion for reconsideration was not made for approximately three months after the Court's May 13, 1976 decision.

Vesco & Co.'s Petition to This Court for Common Law Writ of Certiorari or Mandamus

In December of 1976 Vesco & Co. filed with this Court a petition for a common law writ of certiorari or mandamus

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* Reference to Petitioner's Appendix.

seeking a review of the Court of Appeals' September 14, 1976 order ("Vesco & Co.'s 1976 petition"). That petition, as well as subsequent petition for rehearing, was denied by the Court. *Vesco & Co., Inc.* v. *International Controls Corp.,* 429 U.S. 1088, reh. den. 430 U.S. 976 (1977). As discussed in more detail below Vesco & Co. in that motion raised many of the same arguments raised in the instant petition. Indeed, a substantial portion of the instant petition has been lifted verbatim from Vesco & Co.'s 1976 petition.

Meanwhile, Vesco & Co. also had moved in the District Court for an order enlarging its time to file the Notice of Appeal—upon the ground of excusable neglect—and also for an order, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, vacating and reentering the May 26, 1976 amended judgment. Both motions were denied by Judge Stewart in a decision dated October 27, 1976 (R1a-R8a*).

Vesco & Co.'s Appeal from October 27, 1976 Decision

Although Vesco & Co. appealed from the entire decision and order rendered by Judge Stewart on October 27, 1977, the issues raised on appeal were essentially limited to the District Court's denial of the motion for relief under Rule 60(b). By decision dated June 3, 1977 the United States Court of Appeals for the Second Circuit affirmed the District Court order and decision (*International Controls Corp.* v. *Vesco,* 556 F2d 665 [2d Cir. 1977]). Vesco & Co. is now seeking review of that June 3, 1977 decision.

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* Reference is to Respondent's appendix.

Reasons for Denying Petition

A comparison of the "Questions Presented" contained in the petition with those in Vesco & Co.'s 1976 petition demonstrates that Vesco & Co. is merely presenting many of the same arguments which this Court has already found to be insufficient. For example, once again Vesco & Co. is complaining of the fact that it has not been permitted to defend the action on behalf of Robert Vesco.

In its 1976 petition Vesco & Co. complained that the Court of Appeals had denied its motion for reconsideration of the issues raised but not decided on a prior appeal. In other words, Vesco & Co. argued that the Court of Appeals had improperly declined to "reassume jurisdiction of issues undecided in a prior appeal".* In the instant petition Vesco & Co. complains that the Court of Appeals should have permitted the vacatur and reentry of the May 26, 1976 amended judgment so as to give it the right to be heard on those same issues. Of course Vesco & Co.'s motion to the Court of Appeals for reconsideration which, when denied, led to the filing of the 1976 petition and the subsequently filed motion to the District Court under Rule 60(b), which is the subject matter of the instant petition, were both necessitated by Vesco & Co.'s failure to take a timely appeal from the entry of the May 26, 1976 amended judgment.

As in the case of the 1976 petition, Vesco & Co. argues the merits of certain issues left undecided on the prior appeal to the Court of Appeals. For example, in Point II of the petition it argues that it should have been given the right to be heard on the merits of the claim against Vesco. This is essentially the same argument made in Point I and Point II(3) of the 1976 petition.

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* See Vesco & Co.'s 1976 petition (No. 76-803), p. 2.

Similarly the 1976 petition raised questions concerning the amended complaint and the "alter ego" finding (see 1976 Petition, Points II(2) and II(5) respectively). Similar issues are raised in Points III(2) and III(4) of the instant petition.

The only "new" issue raised by Vesco & Co. on the instant petition is the argument that the damages established at the partial inquest held in mid 1974 did not relate to the federal claims asserted in the complaint. However, even assuming *arguendo* that this is the fact and that Vesco & Co. has standing to raise this issue, nowhere does Vesco & Co. even try to explain why it feels ICC can recover only those damages which resulted from Vesco's violations of the securities laws.* The complaint, in addition to alleging violations of the federal securities laws, also contained a number of pendant common law claims for which Vesco has been found liable. We respectfully submit that ICC was entitled to establish and recover damages for all of Vesco's wrongdoings not just those damages resulting from violations of federal laws.

More important, even ignoring the fact that the instant petition is for the most part a rehash of arguments previously found to be insufficient, none of the issues raised even remotely resemble the types of situations set forth in Rule 19 of this Court's Rules as those to be considered on a petition to this Court for a writ of certiorari. Understandably, Vesco & Co.'s petition is silent in regard to which of the reasons stated in Rule 19 it feels are applicable to the present case.

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* Indeed, it appears that Vesco & Co. in making this argument (essentially at pp. 55-62 of the petition) has lost sight of the fact that the inquest held in 1974 was only a *partial* inquest. The judgment entered expressly preserved ICC's right to prove further damages.

The District Court's Denial of Vesco & Co.'s Rule 60(b) Motion Was a Proper Exercise of Discretion

It should be emphasized that the instant petition involves simply the denial by the District Court of a motion under Rule 60(b) of the Federal Rules of Civil Procedure. Such motions are clearly addressed to the discretion of the trial court. *Atman* v. *Connally,* 456 F.2d 1114, 1116 (2d Cir. 1972); *Sampson* v. *Radio Corporation of America,* 434 F.2d 315, 317 (2d Cir. 1970). The Court of Appeals obviously found no abuse of discretion. Vesco & Co. has offered no reason why such a discretionary ruling should be reviewed by this Court.

Also, it should be noted that the stated purpose of Vesco & Co.'s motion, made after the Court of Appeals denied its motion for reconsideration, was to reinstate its right to appeal after that right had been lost when Vesco failed to take a timely appeal from the May 26, 1977 amended judgment.

It is well settled that a defeated litigant cannot circumvent the time limitations on appeal by styling what is in effect a belated petition for reconsideration as a motion under Rule 60(b). *See, e.g., Cinerama, Inc.* v. *Sweet Music, S.A.,* 482 F.2d 66, 71 (2d Cir. 1973). As set forth in *Hodgson* v. *United Mine Workers of America,* 473 F.2d 118, 124 (D.C. Cir. 1972), a motion under Rule 60(b) "cannot be used to vacate judgments and reinstate them to start the time for appeal anew." "The only issue," continued the Court, "which can be raised on appeal from a denial of Rule 60(b) relief is the propriety of that denial, and not the merits of the judgment from which the relief was sought." *Id. Accord, Wagner* v. *United States,* 316 F.2d 871 (2d Cir. 1963); *Saenz* v. *Kenedy,* 178 F.2d 417, 419 (5th Cir. 1950); *In re Marachowsky Stores Co.,* 188 F.2d 686, 689 (7th Cir.), *cert. denied,* 342 U.S. 822 (1951); *Smith* v. *Stone,* 308 F.2d 15, 17 (9th Cir. 1962).

Wagner v. *United States, supra,* was a tax-refund action against the United States. In making a motion pursuant to Rule 60(b), that a judgment for the defendant entered therein "be vacated and set aside on the ground that such judgment was contrary to the law and contrary to the evidence upon which the said judgment was entered," or, in the alternative, that it "be resettled and re-entered in order to permit the plaintiffs to file a notice of appeal therefrom," plaintiffs' attorney alleged that he was on vacation when the judgment was entered and did not learn of its entry until after the time to appeal had expired. 316 F.2d at 872. An opposing affidavit stated that notice of the decision had appeared in the New York Law Journal on July 3, 1961, and that the government had received post-card notice of entry of judgment from the Clerk on that day. Plaintiffs then appealed from the denial of their Rule 60(b) motion. In a *per curiam* decision the Court of Appeals stated:

> "The catch-all clause of Rule 60(b)(6), authorizing the court to relieve a party from a judgment for 'any other reason justifying relief,' cannot be read to encompass a claim of error for which appeal is the proper remedy; such a reading would emasculate the provisions of Rule 73(a), now codified in 28 U.S.C. § 2107, which strictly limit the time for appeal, and which are re-enforced by the last clause of Rule 6(b) and the last sentence of Rule 77(d)." *Id.* at 872.

In *Perrin* v. *Aluminum Co. of America,* 197 F.2d 254 (9th Cir. 1952), in which appellants made a Rule 60(b)(6) motion to vacate, the Court stated as follows:

> "Rule 60(b) was not intended to be resorted to as an alternative to review by appeal, nor as a means of enlarging by indirection the time for appeal except in compelling circumstances where justice requires that course. Cf. Hill v. Hawes, 320 U.S. 520, 64 S. Ct. 334,

> 88 L.Ed. 283. Appellants had opportunity to obtain appellate review of the very rulings of which they now complain but failed to take advantage of the opportunity within the time prescribed by Rule 73(a). ***Having in consequence of their own lack of diligence been turned away at the front door they now seek entry at the rear. Certainly Rule 60(b) was not designed to afford machinery whereby an aggrieved party may circumvent the policy evidenced by the rule limiting the time for appeal.***" *Id.* at 255 (Emphasis added.)

Accord, Demers v. *Brown,* 343 F.2d 427 (1st Cir. 1965), an appeal from a denial of Rule 60(b) relief, in which the Court stated that "[i]t must be perfectly apparent that plaintiff is seeking to appeal from the original judgment by indirection after the time has expired. What he cannot do directly he cannot do indirectly." *Id.* at 428.

In purported support of its proposition that the District Court *abused* its discretion Vesco & Co. invokes only the following three inapposite decisions: *Fidelity & Deposit Company of Maryland* v. *Usaform Hail Pool, Inc.,* 523 F.2d 744 (5th Cir. 1975); *Expeditions Unlimited* v. *Smithsonian Institute,* 500 F.2d 808 (D.C. Cir. 1974); and *Smith* v. *Jackson Tool & Die, Inc.,* 426 F.2d 5 (5th Cir. 1970). As set forth below, these decisions are evidence only of the fact that the District Court *properly* exercised its discretion in denying the motion of Vesco & Co. for Rule 60(b) relief.

In *Expeditions Unlimited* v. *Smithsonian Institute, supra* (Petition, p. 31), an action in which the Court of Appeals for the District of Columbia reversed a District Court order denying a motion to vacate, it was incontroverted that none of the parties knew of the judgment therein until ten months after it had been entered. The Court found as fact that the negligence of the Court and the Clerk, *not* the negligence of counsel, had resulted in the failure to timely appeal. The foregoing facts starkly contrast with those at bar, which reveal that Vesco & Co. had *actual* notice of the

entry of judgment five days before the thirty-day time to appeal had expired. Moreover, the District Court found as fact that any lack of knowledge prior thereto was the result of Vesco & Co.'s own negligence (R. 2a-3a*).

In *Fidelity & Deposit Company of Maryland* v. *Usaform Hail Pool, Inc., supra* (Petition, p. 29), as well as in *Smith* v. *Jackson Tool & Die, Inc.* (Petition, p. 31),** and contrary to the case at bar, "none of the parties knew of the entry of judgment and none could be said to have relied upon it." 523 F.2d at 751. Accordingly, the Court of Appeals for the Fifth Circuit held that the District Court acted properly in vacating and re-entering its judgment under Rule 60(b). The Court continued as follows:

> "In both cases counsel diligently sought to discharge the duty implicit in F.R. Civ. P. 77(d) to make suitable inquiries to discover for itself the status of the case. Indeed, there is an additional element in the present case. Here, unlike the mere failure of the District Court in *Jackson Tool & Dye* either to postpone entering judgment or to respond to counsel's letters, the District Court assured counsel that his repeated inquiries were unnecessary (and, possibly were beginning to seem repetitious), and that counsel would be informed of the entry of judgment." *Id.* at 751.

The inaction of counsel for Vesco & Co. in the case at bar does not compare favorably with the diligence displayed by counsel in *Fidelity*. As Judge Stewart stated in his memorandum decision of October 27, 1976:

> "First, defendant claims that it did not know that the judgment was entered on May 27, 1976. Defendant

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* Reference to Respondent's Appendix.

** *Smith* v. *Jackson, supra,* involved the granting of a Rule 60(b) motion and the Court of Appeals declined to interfere with the District Court's exercise of discretion.

admits that its attorneys saw the order signed on May 26 (Littman Affidavit ¶ 3). Defendant apparently thought that the prevailing party entered a judgment, and that this party might delay entry so as to put off the 'inevitable' appeal (Littman ¶ 3). Defendant was entirely mistaken about the procedure in the federal courts where a signed order is sent directly from chambers to the Clerk's Office where it is entered in the docket shortly thereafter. (See Rules 58(2) and 79(a) of the F. R. Civ. P.) Ignorance of the Court's procedures is not 'excusable neglect'." *Rousseau* v. *Flota Mercante Grancolombiana,* 303 F.Supp. 1404 (S.D.N.Y. 1969); *Nichol-Morris Corp.* v. *Morris,* 279 F.2d 81 (2d Cir. 1960).

"Second, defendant claims that it was not notified by the Clerk's Office of the entry of judgment as required by F. R. Civ. P. 77(d). This is contradicted by the notation 'M/N' in the docket following the entry of the judgment on May 27, 1976. This notation is used by the Clerk's Office to indicate that notice has been mailed to the parties (Camhy Affidavit, ¶ 4). Even if notice were not mailed by the Clerk, Rule 77(d) specifically provides that '[l]ack of notice of the entry by the Clerk does not affect the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure' where the sole ground for relief is 'excusable neglect.' In this case, but for defendant's apparent ignorance of the Federal procedures for entry of judgment, it would have known that entry would have immediately followed signing of the order, and a routine check with the docket clerk would have informed it that this procedure had been followed. We also note that notice of the order appeared in the June 8, 1976 issue of The New York Law Journal. Thus, even if defendant did not receive notice from the Clerk's Office, it should have known independently that the order was entered, so any failure on the part of the

Clerk's Office is not 'excusable neglect'. See *Nichols-Morris, supra* at 83." (R2a-3a)

In conclusion, the only real issue properly before the Court is whether the District Court abused its discretion in denying Vesco & Co.'s Rule 60(b) motion. The cases invoked by Vesco & Co. in this regard, reflect only a *proper* exercise of discretion by the District Court.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Memorandum Decision of the Honorable Charles E. Stewart, Jr., Filed October 27, 1976.

STEWART, DISTRICT JUDGE:

On May 27, 1976, an amended judgment was entered in this action in response to a May 13 remand from the Court of Appeals due to the absence of a Rule 54(b) of the Federal Rules of Civil Procedure ("F.R.Civ.P.") certification of finality in our July 16, 1974 judgment. Defendant Vesco & Co., Inc. ("Vesco & Co.") filed its notice of appeal from this amended judgment on July 7, 1976, nine days late. On August 4, 1976, plaintiff moved in the Court of Appeals to dismiss the appeal as untimely. Defendant then moved before this court on August 31, 1976 pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure ("F.R.App.P."), for an extension of the time in which to file a notice of appeal on the ground of excusable neglect. On September 14, the Court of Appeals heard plaintiff's motion to dismiss and a cross-motion by defendant that the May 13 remand be reconsidered. The motion to dismiss was granted and the motion to reconsider denied. On September 15, the defendant moved this court to vacate the May 27, 1976 judgment pursuant to Rule 60(b) of the F.R.Civ.P. A hearing was held on both of the motions pending before this court on September 22, 1976, and a further conference was held on October 7 after which the parties submitted additional papers.

Plaintiff, in opposition, initially argues that defendant's motion to extend the time in which to file a notice of appeal should be dismissed because the motion was not made within 60 days after entry of the judgment appealed from, as required by Rule 4(a). The Second Circuit, confronted with this very argument, recently held that

> "the filing of the notice of appeal within 60 days, coupled with a prima facie showing of excusable ne-

> glect, and the timely service of the notice of appeal on the opposing parties, constituted a sufficient manifestation on the part of appellants to permit the district court, in the exercise of its discretion, to treat the notice of appeal as the substantial equivalent of a motion to extend the time because of excusable neglect." *Stirling* v. *Chemical Bank,* 511 F.2d 1030 (2d Cir. 1975).

In the instant case, defendant filed, and served plaintiff with, its notice of appeal within 60 days of the judgment, and made a prima facie showing of excusable neglect. Thus we will exercise our discretion "to treat the notice of appeal as the substantial equivalent of a motion," and consider the substance of the motion.

First, defendant claims that it did not know that the judgment was entered on May 27, 1976. Defendant admits that its attorney saw the order signed on May 26 (Littman Affidavit ¶ 3). Defendant apparently thought that the prevailing party entered a judgment, and that this party might delay entry so as to put off "the inevitable" appeal (Littman ¶ 3). Defendant was entirely mistaken about the procedure in the federal courts where a signed order is sent directly from chambers to the clerk's office where it is entered in the docket shortly thereafter. See Rules 58(2) and 79(a) of the F.R.Civ.P. Ignorance of the court's procedures is not "excusable neglect." *Russo* v. *Flota Mercante Grancolombiana,* 303 F. Supp. 1404 (S.D.N.Y. 1969); *Nichols-Morris Corp.* v. *Morris,* 279 F.2d 81 (2d Cir. 1960).

Second, defendant claims that it was not notified by the clerk's office of the entry of judgment as required by F.R.Civ.P. 77(d). This is contradicted by the notation "m/n" in the docket following the entry of the judgment on May 27, 1976. This notation is used by the clerk's office to indicate that notice has been mailed to the parties (Camhy Affidavit ¶ 4). Even if notice were not mailed by

the clerk, Rule 77(d) specifically provides that "[l]ack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure," where the sole ground for relief is "excusable neglect." In this case, but for defendant's apparent ignorance of the federal procedures for entry of judgment, it would have known that entry would immediately follow signing of the order, and a routine check with the docket clerk would have informed it that this procedure had been followed. We also note that notice of the order appeared in the June 8, 1976 issue of the New York Law Journal. Thus, even if defendant did not receive notice from the clerk's office, it should have known independently that the order was entered, so any failure on the part of the clerk's office is not "excusable neglect." See *Nichols-Morris, supra* at 83.

Finally, on June 24, 1976, five days before the 30-day time to appeal had expired, defendant was informed by the Court of Appeals Clerk, Daniel Fusaro, that the amended judgment had been entered on May 27, 1976 *and* that the previous appeal had been disposed of by the Court of Appeals by its May 13, 1976 remand. Defendant did not file notice within this five-day period although it indicated that it intended at all times to pursue the appeal (Littman ¶ 11). Its only explanation for not filing is that it was "in a quandary . . . as to the proper avenue for further proceedings" (Defendant's August 30 Memorandum p. 5). However confusing the procedural posture of the case may have been earlier, we think that the Fusaro letter made it clear that defendant would have to institute a new appeal in order to have the Court of Appeals consider the other issues that defendant had raised, but which the Court of Appeals had not reached because of its decision to remand. Thus, we

must conclude that defendant's failure to act was the result "of one of those careless omissions to which everyone is indeed subject, but which do not excuse inaction." *Nichols-Morris, supra* at 83.

Accordingly, we deny defendant's motion to extend the time in which to file a notice of appeal.

In the alternative, defendant has moved on several grounds that the judgment be vacated pursuant to F.R.Civ.P. 60(b). Admittedly, defendant's primary interest in this relief is that it would give defendant a chance to pursue a timely appeal upon entry of a corrected judgment.

Defendant's main argument here rests on its contention that the May 27, 1976 judgment is void because it refers only to the original complaint, and not to the amended complaint which had been filed before the default against Robert L. Vesco ("Vesco") was entered.

A brief chronology of the key events relating to this claim is as follows. The original complaint was filed on June 7, 1973 and Vesco was served with summons and complaint on July 30, 1973. An amended complaint was filed on September 7, 1973 and service was purportedly made on Vesco on October 24 and 25, 1973. In the meantime, on October 5, 1973, a default judgment was entered against Vesco on the original complaint. Pursuant to this default judgment, an inquest on damages was held which resulted in our July 16, 1974 judgment awarding plaintiff $2,188,345.93. On April 4, 1975 an amended judgment was entered certifying the finality of the October 5, 1973 and July 16, 1974 judgments. The April 4 amended judgment was itself amended on September 15, 1975 in order to correct an error as to the date of the July 16, 1974 judgment. Plaintiff sought to satisfy some of its outstanding default judgments against Vesco through certain assets of Vesco & Co., and on August 22, 1975 this court held that Vesco &

Co. was the alter ego of Vesco. Vesco & Co. filed its notice of appeal on September 19, 1975 and on May 13, 1976, the Court of Appeals remanded to this court. Our May 27, 1976 judgment certified the finality of, and amended *nunc pro tunc,* the July 16, 1974 judgment.

All the proceedings and ensuing judgments against Vesco have clearly and consistently been based on, and related back to, the original, not the amended, complaint. Defendant apparently had no quarrel with this when it filed its brief on appeal to the Second Circuit since it attacked the default on the basis of the adequacy of service of the original summons and complaint, but never raised the point it now presses. There are in our view, therefore, substantial equitable considerations tending to suggest that defendant should not be permitted to raise for the first time at this very late hour, a procedural issue which could have been presented long ago. In any event, however, we find that defendant's contention is without merit.

The general rule is that once a pleading has been amended, and the amended pleading is complete in itself, it supersedes the original. See 3 Moore's *Federal Practice* § 15.08[7] at 939 (2d Ed. 1975); *Cicchetti* v. *Lucey,* 514 F. 2d 362 (1st Cir. 1975); *La Batt* v. *Twomey,* 513 F.2d 641 (7th Cir. 1975); *Phillips* v. *Murchison,* 194 F. Supp. 620 (S.D.N.Y. 1961). Defendant contends that the superseding effect takes place the moment the amended pleading is filed. While there is some language to this effect in some of the opinions upon which defendant relies (see *Cicchetti* and *Phillips, supra*) none of them were directly concerned with, or addressed, the issue raised by the facts of the instant case. Here the amended complaint was filed before the default judgment on the original complaint was entered, but service was not made, if at all, until after entry of the default judgment. Under these circumstances, plaintiff contends that the mere filing of the amended complaint

should not be held to have caused the original complaint to be superseded.

The relationship between filing and service of a complaint in the first instance is that filing properly commences the action, but

> . . . commencement is merely the threshold to litigation; unless it is ultimately followed by proper service of original process, or defendant waives proper service, the potential jurisdiction which commencement invokes never ripens into actual jurisdiction. 2 Moore's *Federal Practice* § 4.08 at 1024-5 (2d Ed. 1975).

We think that when an *amended* pleading is required to be served on a party, it similarly requires proper service in order to become effective as to this party. Thus, we conclude that if service is not, or cannot, be made of the amended pleading, it does not supersede the original. The question to be determined, therefore, is whether Vesco was properly served with the amended complaint.

Pursuant to Rule 4(i)(1)(E), service of the amended complaint was authorized by this court, on October 19, 1973, to be made as follows:

> (i) by any method of service of process authorized by Rule 4 of the Federal Rules of Civil Procedure; or (ii) as to individual defendants, by leaving a copy of the summons and amended complaint herein upon the premises of such defendant's last known residence located in Nassau, Bahamas and mailing a copy thereof to such defendant at either the Post Office Box of such defendant or to the address of such last known residence of such defendant in Nassau, Bahamas . . .

In light of representations recently made to this court by counsel for plaintiff as to what information was available about Vesco's whereabouts in October of 1973, the terms of

this order may not comport with the requirements of due process. See *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Milliken* v. *Meyer*, 311 U.S. 457 (1940).

However, we need not decide this since we find that the method of service outlined by James Bondi in his November 12, 1973 Affidavit of Service does not comply even with the terms of our order, in that Bondi was not able to "leave" the papers at Vesco's last known residence.

The affidavit recounted that two persons, who had been authorized to effect service, went to Nassau, Bahamas and there located the last known residence of Vesco (Bondi Affidavit ¶ 12). Two gardeners were present on the grounds of the residence, and they called a private security officer when the process servers identified themselves and stated their mission. After the security officer arrived, the process servers again identified themselves. The officer and gardeners both refused to accept the papers, and the officer took photographs of the process servers. At this point, one server threw the papers over the wall onto the grounds, but the gardeners handed them back to the officer who in turn threw them back into the process servers' car (Bondi Affidavit ¶¶ 13 and 14). While this attempt was thwarted by personnel on the grounds of this residence, there is no information that these persons were agents of Vesco, so the failure of the attempt cannot be imputed to Vesco's own efforts. Accordingly, we find that the amended complaint was not properly served and thus, that the amended complaint did not supersede the original, and that all the judgments properly relate to the original complaint.

Defendant's second ground for seeking to open the judgment is that the May 27, 1976 judgment "on its face, does not make sense" (Besser letter of September 15, 1976), if

its references to the various counts of the complaint are read as relating to the original complaint. We have carefully compared the counts of the complaint and those enumerated in the May 27, judgment, and we conclude that the references in the judgment are accurate. Thus we find that the judgment is "comprehensible" on its face.

Finally, defendant seeks to vacate the May 27 judgment on the ground that the reference to a judgment having been entered on July 12, instead of July 16, 1974, was incorrect. We think that this ground is not sufficiently substantive to merit our opening the judgment especially in view of the entire context of this motion.

Accordingly, we deny defendant's motion to vacate the judgment under Rule 60(b), as well as defendant's motion for leave to extend the time in which to file a notice of appeal.

So ordered.

s/s Charles E. Stewart Jr.
United States District Judge

Dated: New York, N. Y.
October 27, 1976.